STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of JOSEPH G. BERG, JR., Deceased.

LUCILLE WOLCOTT and LAWRENCE BERG,

Petitioners-Appellants,

v

ROBERT G. BERG, Personal Representative of the Estate of JOSEPH J. BERG, JR.,

Respondent-Appellee.

UNPUBLISHED
March 13, 2007

No. 272255
Bay County Probate Court
LC No. 05-045334-DE

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

Petitioners appeal as of right from an opinion and order by the probate court granting respondent's motion for summary disposition of petitioners' objection to the estate's inventory. We affirm in part, reverse in part, and remand for further proceedings.

I. Facts and Procedural History

Joseph G. Berg died in November 2005. Joseph was never married and had no children, but did leave behind three siblings, George R. Berg, Lucille Wolcott,[1] and Lawrence Berg. Joseph executed a will in 1997, which nominated his nephew Robert G. Berg[2] to be the personal representative of his estate. Under the terms of the will, Joseph made several specific bequests, but left the residue of his estate to his siblings in equal shares.

In December 2005, Robert applied for informal probate of Joseph's estate and was appointed as the estate's personal representative. In March 2006, Robert asked the court to

[1] Lucille Wolcott is also known as Margaret L. Wolcott.

[2] Robert is the son of George R. Berg (George R.). George R. also has a son named George J. Berg (George J.).

formally probate Joseph's estate. In April 2006, the probate court granted Robert's request and issued formal letters of authority to him.

In April 2006, petitioners objected to the inventory filed by Robert. Petitioners claimed that the inventory failed to list numerous items of value including the balances of three bank accounts, stock, two insurance policies, the proceeds of the sale of Joseph's interest in a John Deere eight row planter, bonds and certificates of deposit, documentation concerning payments Joseph received for the purchase of the Mieske farm, several guns, the contents of a home, income from crops, farm equipment, Joseph's share in an oil well, and several vehicles. In addition, petitioners claimed that Robert had misrepresented the value of Joseph's personal effects. Based on these alleged omissions, petitioners asked the probate court to order Robert to prepare a new inventory that accounted for these items.

In May 2006, respondent moved for summary disposition of petitioners' objection to the inventory. In support of his motion, respondent presented evidence that Joseph had two Chemical Bank accounts and a Dow Credit Union Account and Dow stock, which were held as joint tenancies with rights of survivorship. Respondent further presented evidence that Joseph had transferred all his farm equipment, including his interest in the planter, to George R. prior to his death. Because the farm equipment was transferred prior to Joseph's death and the stock and bank accounts were held jointly with rights of survivorship, respondent argued that those items were not assets of the estate. Respondent also argued that the insurance proceeds were not assets of the estate. In addition, Robert averred that he had discovered no evidence that Joseph owned any bonds, certificates of deposit or interest in an oil well and found no firearms among Joseph's personal effects. He also averred that Joseph had no interest in the Mieske farm and that he (Robert) and his brother George J. had repaid Joseph the money Joseph lent them to purchase the farm. Respondent also indicated that there was one truck in Joseph's name, which he stated would be added to the inventory, as would the crop proceeds. Finally, Robert averred that the inventory accurately reflected the value of Joseph's personal effects.

Petitioners responded to the motion by arguing that Joseph created joint tenancies in the bank accounts and stock for convenience only and that he had not intended to actually give them to Robert or George R., but rather intended for the cash and stock to be distributed to his siblings equally. Petitioners also argued in the alternative that Joseph either lacked the mental capacity to create joint tenancies in those accounts or was under the undue influence of Robert or George R. at the time the joint tenancies were created. Petitioners also submitted several affidavits that stated that Joseph had old coins, several guns and habitually kept cash in his home safe.

At a hearing held on June 2006, the probate court heard the parties' arguments and determined that summary disposition was appropriate for most of the items listed on petitioners' objection to the inventory. Specifically, the probate court determined that the Chemical Bank account ending in 1169 and the Dow stock were clearly not part of the estate because they were jointly held with rights of survivorship dating back to 1990. The probate court also determined that there was no evidence that Joseph owned bonds or certificates of deposit and stated that there was no evidence to contradict respondent's proof that the loan for the Mieske farm had been repaid and that the farm equipment had been properly transferred to George R. prior to Joseph's death. However, the probate court determined that there were factual questions concerning whether the creation of joint tenancies in the Chemical Bank account ending in 5430 and in the Credit Union account were proper, concerning the proceeds from the sale of the eight-

row planter, and concerning whether there were guns, coins and cash from a safe that should have been listed on the inventory. After these determinations, the probate court heard testimony from several witnesses concerning the disputed items and took the matter under advisement. In July 2006, the probate court issued an opinion and order. Based on the determinations made at the hearing and findings based on the testimony presented, the probate court dismissed petitioners' objections to the inventory in their entirety under MCR 2.116(C)(10).

This appeal followed.

II. Analysis

On appeal, petitioners argue that there were issues of material fact concerning whether the three bank accounts at issue, the stock, the farm equipment and the guns, coins and other personal property should have been listed as assets of the estate on the inventory.[3] Therefore, petitioners contend, the probate court should not have granted respondent's motion for summary disposition of petitioners' objections. We agree in part and disagree in part.

This Court reviews de novo decisions on motions for summary disposition. *State Farm Fire & Casualty Co v Corby Energy Services, Inc*, 271 Mich App 480, 482; 722 NW2d 906 (2006). In evaluating a motion for summary disposition, this Court reviews the evidence submitted by the parties in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*

A. Chemical Bank Account Ending in 1169 and Dow Stock

On appeal, petitioners argue that the probate court should not have granted summary disposition in favor of respondent as to Joseph's Chemical Bank account ending in 1169 because they presented sufficient evidence to establish a question of fact as to whether Joseph intended to grant rights of survivorship in the account and whether he was under undue influence. We do not agree.

On the death of a person holding a bank account jointly with rights of survivorship, the account balance passes by operation of law to the surviving joint tenant or tenants. MCL 487.703; *Jacques v Jacques*, 352 Mich 127, 134-135; 89 NW2d 451 (1958). The parties agree that Joseph added Robert to this account as a joint tenant with rights of survivorship in 1990 and that he also added George R. in 2005. However, petitioners contend that these changes to the account were merely done for convenience and that Joseph lacked the actual intent to create a joint tenancy with rights of survivorship.

[3] Petitioners have not appealed the probate court's grant of summary disposition as to the bonds, certificates of deposit, Joseph's alleged interest in an oil well, the debt allegedly owed for the Mieske farm or insurance proceeds.

Under MCL 487.703, when a deposit is made in the name of the depositor or any other person "in form to be paid to either or the survivor of them," it is prima facie evidence that the depositor intended to vest title to the deposit in the survivor or survivors. *Jacques*, *supra* at 136. Nevertheless, this evidence may be rebutted by reasonably clear and persuasive proof that the depositor intended otherwise. *Id.* at 136-137.

In the present case, petitioners presented an affidavit by Lucille wherein she averred that Joseph told her that he only added George R. to his checking account in order to enable George R. to pay bills. This affidavit was insufficient to create a question of fact as to whether this account was part of Joseph's estate. First, we note that Lucille's averment refers generally to Joseph's checking account and there is no way to determine whether the statement applies to the account ending in 1169. In addition, the averment indicates that Joseph made the alleged statements after George R. was added to the account. "[S]tatements of intent made by a decedent, not in the presence of his joint owner, after creation of a joint bank account are not admissible to establish his intent at the time of creating the account." *In re Skulina Estate*, 168 Mich App 704, 710; 425 NW2d 135 (1988), citing *Pence v* Wessels, 320 Mich 195; 30 NW2d 834 (1948). Consequently, the affidavit was not admissible to demonstrate Joseph's intent at the time he added George R. to the account. Finally, even if this affidavit were admissible evidence of Joseph's intent, because this averment refers to George R. and not Robert, who was added to the account in 1990, it is insufficient to rebut the presumption that Joseph intended to vest title to the account in Robert. Hence, even if George R. had not been added as a joint tenant with rights of survivorship, the account would still have passed to Robert by operation of law. Likewise, there is no evidence that Joseph was under undue influence in 1990 when he added Robert to the account, therefore, even if Joseph were under undue influence when he added George R., the result would be the same. The probate court did not err when it concluded that, as a matter of law, this account was not part of Joseph's estate.

For the same reasons, the probate court properly determined that the Dow stock passed as a matter of law outside Joseph's will. It is undisputed that Joseph had the Dow stock reissued to himself and Robert as joint tenants with rights of survivorship in 1990. There is no evidence that Joseph was under any undue influence at the time of this transfer. Further, although petitioners submitted affidavits wherein they averred that Joseph told them that he added Robert to the stock for "safekeeping" and that Robert promised to divide the stock equally between Lucille, Lawrence and George R., these affidavits were inadmissible to prove Joseph's intent at the time he reordered the stock certificates. *Id.* Therefore, the probate court did not err when it granted summary disposition as to the Dow stock.

B. Chemical Bank Account Ending in 5430 and Credit Union Account

Petitioner also contends that the probate court erred when it granted summary disposition in favor of respondents as to whether Joseph's Chemical Bank account ending in 5430 and Credit Union accounts were part of Joseph's estate. Petitioners again argue that they presented sufficient evidence to establish a question of fact as to whether Joseph intended to make George R. and Robert joint tenants with rights of survivorship on these accounts or was under undue influence.

At the June 2006 hearing on respondent's motion for summary disposition, the probate court determined that there were questions of fact as to whether Joseph intended to make George

R. and Robert joint tenants with rights of survivorship on these accounts or was under undue influence. However, immediately after making this determination, the parties proceeded to call witnesses and present evidence concerning Joseph's intentions and whether he was under undue influence. The probate court took this testimony under advisement and issued an opinion and order in July 2006.

In the opinion and order, the probate court specifically found, based on the evidence and testimony presented, that Joseph had instructed George R. to use his power of attorney to add himself and Robert to Chemical Bank account ending in 5430 as joint tenants with rights of survivorship. The probate court also found that there was no independent evidence of undue influence and the presumption of undue influence created by George R's use of his power of attorney was rebutted. Likewise, the probate court found that Joseph personally added George R. to his credit union account with the intent to make him a joint tenant with rights of survivorship and that he was not under undue influence at that time. The probate court clarified that it found that "[a]ny presumption of undue influence was rebutted through testimony."

In September 2004, Joseph executed a durable power of attorney that appointed George R. and Robert to be his attorneys-in-fact. In April 2005, while the power of attorney was still in effect, Joseph added George R. to the credit union account as a joint tenant with rights of survivorship. In addition, documentary evidence indicates that, shortly before Joseph died, George R. used his power of attorney to add himself and Robert to the Chemical Bank account ending in 5430 as joint tenants with rights of survivorship. The existence of the power of attorney at the time George R. was added to the credit union account and the actual use of the power of attorney to add George R. and Robert to the Chemical Bank account, coupled with George R. and Robert's opportunity to influence Joseph's decisions, creates a presumption that the additions were made as the result of undue influence. See *In re Karmey Estate*, 468 Mich 68, 73; 658 NW2d 796 (2003), quoting *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976). Because this presumption was not rebutted, we agree with the probate court's initial conclusion that there were questions of fact concerning whether the creation of the joint tenancies for these accounts were the result of undue influence. Further, although the probate court appears to have conducted a trial on the merits concerning these accounts with the consent of the parties, the probate court did not indicate that it was dismissing the objection after a bench trial on the merits, but rather issued an order purporting to grant summary disposition in favor of respondent under MCR 2.116(C)(10).[4] It is well established that a trial court "is not permitted to assess credibility, or to determine facts" when considering a motion under MCR 2.116(C)(10). *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Therefore, the probate court erred when it granted summary disposition as to these accounts based on its findings of fact.

C. Farm Equipment

[4] We disagree with respondent's contention that petitioners waived their right to argue that there were disputed factual questions when they participated without objection in the examination of witnesses at the June 2006 hearing. Even if the parties agreed to proceed with a bench trial, the probate court ultimately based its decision on MCR 2.116(C)(10). Therefore, we shall limit our review accordingly.

Petitioners also argue that there was a question of fact as to whether Joseph was under undue influence when he transferred approximately $300,000 in farm equipment to George R. Therefore, petitioners further argue, the probate court should not have granted summary disposition regarding whether the farm equipment was part of Joseph's estate. We agree.

In his 1997 will, Joseph bequeathed all his farm equipment to his brother George R. Nevertheless, in July 2005, Joseph executed a document that purported to transfer all his farm equipment to George R. Before the probate court, petitioners argued that George R. used his influence to get Joseph to purchase farm equipment that he did not need in order to inherit the equipment when Joseph died. In addition, petitioners argued that Joseph was under undue influence when he signed the document that purported to transfer the farm equipment in July 2005.

At the June 2006 hearing, the probate court concluded that there were no questions of fact concerning the majority of the farm equipment, but elected to permit testimony concerning Joseph's interest in a John Deere eight-row planter. Although the probate court stated that there was no question of fact concerning the majority of the farm equipment, the probate court nevertheless made factual findings in its opinion and order of July 2006. Specifically, the probate court found that Joseph was not under undue influence when he transferred the farm equipment in July 2005. The probate court then concluded that, because all the farm equipment had been transferred prior to Joseph's death, it was not part of Joseph's estate.

After petitioners objected to the inventory and petitioned the probate court for appropriate relief, respondent moved for summary disposition. Respondent supported his contention that the farm equipment passed outside Joseph's will by submitting an affidavit by Robert wherein he stated that he had personal knowledge that Joseph transferred all his farm equipment by bill of sale to George R. in July 2005. Respondent also submitted a copy of the document purporting to memorialize the transfer. Petitioners responded by asserting that Joseph was presumptively under the undue influence of George R. when he made the transfer because George R. had power of attorney to conduct Joseph's financial affairs. Because George R. had power of attorney over Joseph's financial affairs, clearly benefited from the transfer and had the opportunity to influence Joseph's decision to transfer the farm equipment, there is a presumption that the transfer was made under undue influence. *In re Karmey Estate*, *supra* at 73. Hence, there was a question of fact concerning whether the farm equipment was effectively transferred prior to Joseph's death. Further, although the probate court appears to have resolved this fact question in favor of respondent, because the probate court's opinion and order purports to grant relief under MCR 2.116(C)(10), it could not properly rely on its factual findings. *Skinner*, *supra* at 161. Therefore, it was error to grant summary disposition in favor of respondent as to the farm equipment.

We also disagree with the probate court's conclusion that summary disposition would also be warranted as to the farm equipment because Joseph's will bequeathed the farm equipment to George R. and, thereby, rendered the issue moot. If the farm equipment were to be transferred through Joseph's will, the equipment would be subject to the claims of creditors of the estate. Hence, a greater portion of the other assets of the estate might be preserved for distribution to the beneficiaries. See MCL 700.3805. Consequently, the fact that the farm equipment might ultimately be transferred by will to the same person to whom it was purportedly transferred *inter vivos* does not render the issue moot.

D. Other Property

Finally, petitioners contend that the probate court erred when it concluded that there were no questions of fact concerning whether Joseph's personal property was properly accounted for in the inventory. We agree in part.

At the June 2006 hearing, the probate court initially concluded that there were questions of fact concerning whether there were guns, coins, and cash that were improperly excluded from the inventory of Joseph's estate. After making this determination, the probate court took testimony concerning these items. In its opinion and order granting summary disposition, the probate court found the testimony of George J. and Robert credible and, based on their accounts, concluded that Joseph transferred his guns to George J. before his death. The probate court also found that there was insufficient evidence to support petitioners' claims that there was an unfair distribution of Joseph's remaining personal property.

We agree with the probate court's initial conclusion that there were questions of fact concerning the guns, coins and cash, which Joseph allegedly kept in his safe. Petitioners submitted affidavits in support of their response to respondent's motion for summary disposition. In these affidavits, Lucille and Lawrence averred that George R. told them that he removed Joseph's guns in order to keep them safe while the persons attending to Joseph's care were at Joseph's home. They also averred that Joseph habitually kept at least $1000 in cash in his safe and that he had old coins in a jar in his basement. In addition, Lawrence averred that Robert told him that he found the coins and that they would be distributed to the beneficiaries. These affidavits were adequate to establish questions of fact concerning whether the guns, coins, and cash should have been included in the inventory for Joseph's estate. Further, as already noted, because the probate court granted relief based on MCR 2.116(C)(10), it could not properly rely on its own assessment of the weight and credibility of the evidence. *Skinner*, *supra* at 161. Therefore, the probate court erred when it granted summary disposition as to these items. However, because petitioners failed to present any evidence concerning any other personal property or the procedures employed in the distribution of the remaining personal property, summary disposition in favor of respondent was appropriate as to all other personal property.

III. Conclusion

The probate court erred when it granted summary disposition in favor of respondent as to the Chemical Bank account ending in 5430, Credit Union account, farm equipment, guns, coins and cash purportedly stored in Joseph's safe. Therefore, we reverse the decision of the probate court, vacate its opinion with respect to these items and remand for further proceedings consistent with this opinion. In all other respects, we affirm. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Michael R. Smolenski